

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

(203)

CR-14361-2018

Date of Decision : March 28, 2023

Swaran Kaur

.. Petitioner

Versus

Narender Singh and others

.. Respondents

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. Ashok Verma, Advocate, for the petitioner.

Mr. Raghav Goel, Advocate, for respondent No.1.

HARSIMRAN SINGH SETHI J. (ORAL)

Present civil revision petition has been filed for setting aside the ex parte judgment and decree dated 24.11.2009 (Annexure P-4 and P-5) by which the suit filed by respondent No.1 has been decreed, the order dated 06.12.2016 (Annexure P-7) passed by the trial Court dismissing the application preferred by the petitioner under Order 9 Rule 13 of the CPC for setting aside the said ex parte decree as well as the order dated 26.10.2018 (Annexure P-9) passed by the lower Appellate Court upholding the order dated 06.12.2016 passed by the trial Court on an application under Order 9 Rule 13 of the CPC.

Certain facts needs to be mentioned for correct appreciation of the controversy in hand.

Respondent No.1 is the son of the petitioner herein and the other respondents are brothers and sisters of respondent No.1 i.e children of

petitioner herein. The suit was filed by respondent No.1-plaintiff seeking possession by way of specific performance on the basis of the agreement to sell dated 27.02.1997 and the date of registration of sale deed was fixed for 28.07.1997, which was further extended by an agreement dated 26.07.1997. In the said civil suit, the petitioner as well as respondents No. 2 to 4 were impleaded as defendants. At the time when the suit was filed, it is being alleged that respondents No. 2 and 3 were minor. Petitioner along with other defendants appeared to defend the suit through a counsel but later on, on the statement of the said counsel that he has no instructions, the trial Court vide order dated 06.08.2009 proceeded ex parte against defendant No.1 to 3 and 4.

Thereafter, an ex parte decree was passed on 24.11.2009 decreeing the suit in favour of respondent No.1-plaintiff qua the specific performance of the agreement to sell with regard to the property in question, which is a house wherein all the petitioner as well as defendants were jointly residing. Thereafter, an execution petition was filed by respondent No.1 for the execution of the ex parte decree dated 24.11.2009 and immediate upon the receipt of the notice, the application was filed under Order 9 Rule 13 of the CPC for setting aside the ex parte decree on 15.10.2012 itself. It was mentioned in the said application that petitioner No.1 is an illiterate lady and other defendants who were minor, were made to understand by their counsel that as and when their presence will be necessary, they will be called, hence, under the impression that they are being defended properly, the defendants never came to know that they have been proceeded ex parte keeping in view the statement of the counsel and ex parte decree has been passed. As alleged that upon coming to know that an

ex parte decree has been passed against the petitioner/defendants, an application under Order 9 Rule 13 of the CPC was filed for setting aside the said ex parte decree.

The trial Court considered the said application and held that once the petitioner/defendants were represented by a counsel, it is clear that they were served, hence, it was their duty to defend themselves diligently and the Court only acted once the counsel defending defendants No. 1 to 3, as projected pleaded no instructions. Hence, once the defendants absented themselves without there being any valid justification, it cannot be said that they had a valid justification for not defending themselves properly before being proceeded ex parte and the application filed under Order 9 Rule 13 was dismissed on 06.12.2016.

Against the said order, the appeal was preferred by the petitioner which appeal has also been dismissed by the lower Appellate Court on 26.10.2018 by recording a fact that the notice of the execution of the ex parte decree was received by the petitioner on 15.09.2012 however, the application under Order 9 Rule 13 was filed on 17.10.2012 and the same was time barred being filed after a month, hence, no interference is called for and the appeal was dismissed. Hence, the present civil revision petition.

Learned counsel for the petitioner argues that as the petitioner is the mother of respondent No.1, who is plaintiff and the respondent No.1 had filed civil suit for specific performance of the agreement to sell with regard to the property in question was inherited by all the family members from the father of respondent No.1 i.e. husband of present petitioner.

Learned counsel for the petitioner further submits that all the family members were residing in the property in question and petitioner No.1 being

illiterate, undue benefit has been taken especially when the other defendants, who are brothers and sister of respondent No.1, were minor in age.

Learned counsel for the petitioner submits that the petitioner is 75 years of age and is illiterate and respondent No.1 has manipulated an ex parte decree, hence, the trial Court should have accepted the application filed under Order 9 Rule 13 of the CPC so as to set aside the ex parte judgment and decree dated 29.11.2009.

Learned counsel for the petitioner further submits that the Appellate Court has wrongly held that the application filed under Order 9 Rule 13 of the CPC was time barred for the reason that the application was filed on 15.10.2012 itself, which is clear from the signature of the Sub Judge accepting the said application, hence, wrong facts have been taken in consideration by the lower Appellate Court while deciding the appeal preferred by the petitioner against the order passed by the trial Court dated 06.12.2016 and hence, the said order being factually incorrect, is liable to be set aside.

Learned counsel for the petitioner further submits that in any case, if the counsel for defendants had projected the no instructions, it was the duty of the Court to issue notice to the respondents as the suit was at initial stage at that time. He relies upon the judgment of the Hon'ble Supreme Court of India in *Malkiat Singh vs. Joginder Singh 1998 (2) SCC 206*.

Learned counsel for the respondents submits that once the counsel represented the petitioner and other defendants pleading no instructions, the Court was well within its jurisdiction to proceed with the

the suit in accordance with law by proceeding ex parte against defendants No. 1 to 3, hence, the grievance being raised by the petitioner is liable to be rejected and the ex parte judgment and decree, which has been upheld while dismissing the application by the Courts below, may be upheld.

I have heard learned counsel for the parties and have gone through the record with their able assistance.

The facts which have been mentioned hereinbefore clearly go on to show that the property in question for which the suit of specific performance was filed, was inherited from the father by all the legal heirs including petitioner, respondent No.1 and the other defendants who are minor brother and sister of respondent No.1/plaintiff. The mother i.e. petitioner herein is an illiterate old lady aged 75 years, who has acted in a bona fide manner so as to engage a counsel. Once, the said counsel pleaded no instructions, it was incumbent upon the Court to ensure by the service of the summon upon the respondents to ensure whether there was any foul play or not, especially when the parties to the suit were family, residing in a same house, which property was in dispute in the civil suit. The Court accepted the statement of the counsel pleading no instructions and proceeded the defendants ex parte. The haste in declaring the respondents ex parte, in the facts and circumstances of this case, cannot be appreciated or upheld.

Keeping in view the settled principle of law settled by the Hon'ble Supreme Court of India in *Malkiat Singh's case (supra)*, it was incumbent upon the Court, in the fact and circumstances of the present case to issue notice to the defendants to ensure their participation in the proceedings and also to rule out any foul play, which was not done, hence, the case made out by the petitioner before the trial Court in the application

filed under Order 9 Rule 13 of the CPC, has a merit so as to be accepted. The rejection of the same merely on the ground that the defendants should have been vigilant enough to defend themselves ignoring certain facts such as that the parties to the dispute were family being illiterate mother and son and brothers including the minor siblings of respondent No.1.

Furthermore, the appeal filed against the order of rejection of the application filed under Order 9 Rule 13 of the CPC has wrongly been rejected by the Lower Appellate Court being time barred. The perusal of the application clearly shows that the same was submitted before the Sub Judge on 15.10.2012 within limitation though the same might have been put up for hearing after a period of 2 days on 17.10.2012. That being so, the order passed by the lower Appellate Court dated 26.10.2018 is contrary to the actual facts and cannot be sustained in the eyes of law.

Keeping in view the above, the present civil revision petition is allowed. The application filed under Order 9 Rule 13 of the CPC so as to set aside the ex parte judgment dated 24.11.2009 is accepted. The order dated 06.12.2016 rejecting the application filed by the petitioner under Order Rule 13 of the CPC as well as the order passed by the lower Appellate Court dated 26.10.2018 upholding the order dated 06.12.2016 (Annexures P-7 and P-9) respectively are also set aside. Trial Court is directed to proceed in the suit in accordance with law henceforth.

March 28, 2023

harsha

(HARSIMRAN SINGH SETHI)

JUDGE

Whether speaking/reasoned : Yes

Whether reportable : Yes